Supreme Court, U.S.
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No. 95-974

In The Supreme Court Of The United States

October Term, 1995

Arizonans for Official English
and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelley F. Yniguez;
Jaime Gutierrez; and Arizonans
Against Constitutional Tampering
Respondents

On Petition for a Writ Of Certiorari to the
United States Court of Appeals for The Ninth Circuit

BRIEF AMICUS CURIAE OF ARIZONA LEGISLATORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Interest of Amici

Amici curiae are 39 members of the Arizona Legislature: President of the Senate John Greene, Speaker of the House of Representatives Mark Killian, Senate Majority Leader Thomas C. Patterson, House Majority Leader J. Ernest Baird, Senate Majority Whip Janice K. Brewer, House Speaker *Pro Tem* Donald Aldridge, Senators Stan Barnes, Keith Bee, Brenda Burns, Larry Chesley, Randall Gnant, John Huppenthal, John Kaites, Patricia Noland, David Petersen, Gary Richardson, Marc Spitzer, Carol Springer and Warren Austin Turner, and Representatives Carolyn Allen, Robert Blendu Sr., Russell Bowers, Fulton Brock, Scott Bundgaard, Robert Burns, David Farnsworth, Jeff Groscost, Winifred Hershberger, Marilyn Jarrett, Wes Marsh, Bill McGibbon, Jean McGrath, Paul Mortensen, Jerry Overton, Dan Schottel, Robin Shaw, Tom Smith and James Weiers. On the advice of the Clerk, this brief is filed on behalf of the named Arizona legislators, without consent of the parties.

This case affects amici's ability to develop, enact, and oversee enforcement of the laws of Arizona, including the ability of the State to determine important public policies. In addition, because the 6-5 *en banc* majority opinion below grants sweeping rights for public employees to sue the State under the First Amendment, amici are vitally interested in review of this matter to determine the ultimate fiscal impact on the State.

The State of Arizona was denied a complete right to appear in this case. *Yniguez v. Arizona*, 939 F.2d 727, 740 (9th Cir. 1991). Legislators have a right to protect their legislative interests. *Coleman v. Miller*, 307 U.S. 433, 438 (1939)(protected interest in vindicating vote); *Karcher v. May*, 484 U.S. 72, 84 (1987)(legislature may defend constitutionality of statute attacked in federal court).

ADDITIONAL REASONS TO ISSUE THE WRIT

This Court has granted *certiorari* to review interference with a State's rights and powers. *New York v. United States*, 505 U.S. 144 (1992)(States are not appendages of federal government). "[I]n many articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, is distinctly recognized." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869). A State's choices in conducting its own affairs are "function[s] essential to [States'] separate and independent existence." *Coyle v. Oklahoma*, 221 U.S. 559, 595 (1911). *See also, New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

A government may promote a position without infringing the rights of persons who disagree or wish to exercise their own free speech rights. *Maher v. Roe*, 432 U.S. 464, 474 (1977)(State may make a value judgment and allocate public funds to implement that judgment). As this Court said in *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), "To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect." This Court would not adopt that position: "Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must

subsidize analogous counterpart rights. But the Court has soundly rejected the proposition." *Id.*

What the government may do through funding, it may also do by allocating staff and other public resources. *Webster v. Reproductive Health Services*, 492 U.S. 490, 510 (1989). Thus, Arizona could make a language choice for official actions, subsidize its choice by allocating resources and staff, and choose to allocate resources to the use of other languages only in a few cases. That is exactly what Article XXVIII does, and with good reason:

> Arizonans speak dozens of languages, enriching the lives of all its citizens, but complicating decisions about governmental services. For example, how could Arizona respond to service requests in Spanish and not in several of the native American languages that so enrich the State? Arizona would have to either print documents in numerous languages or provide instantaneous translation.

This could be an enormous burden, and courts have consistently refused to order such language assistance. *See, e.g., Frontera v. Sindell*, 522 F.2d 1215, 1219 (6th Cir. 1975)("In order to accommodate all nationality groups, the city might be compelled to establish a department of languages with a staff of linguists to translate the tests and supervise them"); *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 124 (S.D.N.Y. 1991)("To accept plaintiff's contention that as a constitutional – rather than legislative – matter, plaintiff has a right to have certain documents written in Spanish would place an insurmountable and unjustified burden on the Housing Authority.").

Before the 6-5 *en banc* majority's decision, the First Amendment did not determine a State's choice of language: "Such matters are for the people to decide." *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978). The

6-5 *en banc* majority, however, has now "disapproved" *Guadalupe*.

Simply put, the 6-5 *en banc* majority decision places the decision in the hands of the federal courts instead of the people. "Courts will routinely make judgments traditionally reserved for the legislature and the people themselves." 69 F.3d 920, 962 (9th Cir. 1995)(Kozinski, J., dissenting).[1] This interference with traditional state prerogatives conflicts with decisions of this Court on an exceedingly important issue and should be reviewed.

The Tenth Amendment protects a State's traditional decisions from federal intrusion. The protection of State sovereignty ultimately protects the **individual**. *New York v. United States*, 505 U.S. at 181. "[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id., quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The proper scope of the Tenth Amendment is an important Federal issue, and the 6-5 *en banc* majority's decision pitting First Amendment rights against the Tenth Amendment rights of the State should be reviewed.

1 Nor is Article XXVIII the only part of Arizona's laws at risk under this case. As part of Arizona's Enabling Act, Congress required that Arizona's public schools "shall always be conducted in English" and that Arizona legislators be capable of communicating in English without an interpreter. Act of June 20, 1910, c. 310, 36 Stat. 557, 568-79; ARIZ. CONST., Art. XX, §§ 7, 8. Similarly, Arizona's bilingual education statute provides that the goal of transitional bilingual education is to teach children English so they can transfer to classes taught exclusively in English. A.R.S. § 15-754. Arizona can now expect First Amendment challenges to those traditional policies.

CONCLUSION

Amici respectfully urge this Court to grant the petition.

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